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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARMED FORCES COOPERATIVE
INSURING ASSOCIATION,

Appellants,

—vs—

DEPARTMENT OF INSURANCE, STATE OF WYOMING,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF WYOMING

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page No.
Table of Authorities	iii
I. ISSUES INVOLVED AND THE NATURE OF THE CASE	2
A. ISSUES	2
B. PROCEEDINGS BELOW	3
II. THE ISSUES RAISED IN THE APPELLANT'S JURISDICTIONAL STATEMENT MAKE IT CLEAR THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT	3
A. UNDER THE McCARRAN-FERGUSON ACT AND GENERAL PRINCIPLES OF JURISDICTION, THE STATE OF WYOMING HAS THE AUTHORITY TO REGULATE AFCIA	3
B. THE REGULATION WHICH THE STATE OF WYOMING HAS IMPOSED ON AFCIA IS CONSISTENT WITH THE GUIDELINES SET DOWN BY THE U.S. SUPREME COURT	4
C. AFCIA IS NOT A FEDERAL ENCLAVE OR A FEDERAL INSTRUMENTALITY AND HENCE IS NOT EXCEPTED FROM REGULATION OR TAXATION FOR THAT REASON	5
D. THE TAX IMPOSED IS FAIRLY APPORTIONED UNDER CONSTITUTIONAL STANDARDS	7
E. APPELLANT MAKES NO LEGALLY OR PHILOSOPHICALLY COGNIZABLE ARGUMENT WITH RESPECT TO IMPAIRMENT OF CONTRACT	7
III. NO SUBSTANTIALY FEDERAL QUESTION IS RAISED	8

IV. THERE IS AN ADEQUATE STATE BASIS FOR ONE OF THE QUESTIONS AT ISSUE HERE 9

V. CONCLUSION 10

TABLE OF AUTHORITIES

CASES:	Page
Allgeyer v. State of Louisiana (1897)	4
Connecticut General Life Insurance Company v. Johnson, 303 U.S. 77, 58 S. Ct. 436, 82 L.Ed. 673 (1938)	4
Department of Employment v. United States, 385 U.S. 355, 87 S. Ct. 464, L.Ed.2d 414 (1966)	6
General Motors Corp. v. Washington, 377 U.S. 436, 440-441, 84 S. Ct. 1564, 12 L.Ed.2d 430 (1953)	7
Honson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L.Ed.2d 1283 (1958), rehearing denied 358 U.S. 858, 79 S. Ct. 10, 3 L.Ed.2d 92	3
Hooper v. California, 155 U.S. 648, 15 S. Ct. 207, 39 L.Ed. 197 (1895)	4
Hoopseton Canning Co. v. Cullen, 318 U.S. 313, 63 S. Ct. 602, 87 L.Ed. 777 (1943)	5
International Shoe Company v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 2d (1945)	4
Johnson v. Maryland, 254 U.S. 51, 41 S. Ct. 16, 65 L.Ed. 126 (1920)	6
McCulloch v. Maryland, 17 U.S. (4 Wheat. 316) 429, 4 L.Ed. 579 (1819)	6
McGee v. International Life Insurance Co., 355 U.S. 220, 78 S. Ct. 199, 2 L.Ed.2d 233 (1957)	4

Ministers Life and Casualty Union v. Haase, ... 5
30 Wis.2d 339, 141 N.W.2d 287 (1966), appeal dismissed 385 U.S. 205, 87 S. Ct. 407, 17 L.Ed.2d 301, reh. den. 285 U.S. 1033, 87 S. Ct. 739, 17 L. Ed. 2d 681.

Olmstead v. American Granby Co., ... 4
565 P.2d 108 (Wyo. 1977)

Osborn v. Ozlin, 310 U.S. 53, 60 S. Ct. 758, ... 5
84 L.Ed. 1074 (1940)

People v. United National Life Insurance 5
Company, 58 Cal. Rptr. 599, 427 P.2d 199 (1967)

Standard Oil Company of California v. Johnson, ... 6
316 U.S. 481, 62 S. Ct. 1168, 86 L.Ed. 1611 (1942)

State Board of Insurance v. Todd Shipyards, ... 5
370 U.S. 451, 82 S. Ct. 1380, 8 L.Ed. 2d 620 (1962)

St. Louis Cotton Compress Company v. State of Arkansas, . 4
260 U.S. 346, 43 S. Ct. 125, 67 L.Ed. 297 (1922)
Travelers Health Association v. Virginia, ... 4,5
339 U.S. 643, 70 S. Ct. 927, 94 L.Ed. 1154 (195)

STATUTES:

McCarran-Ferguson Act, 15 U.S.C. 3
§§1011-1015

15 U.S.C.A. 1012, Footnote 15 7

TEXTS:

Wright, *Law of Federal Courts (1970)* 8,9

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—VS—

DEPARTMENT OF INSURANCE, STATE OF WYOMING,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WYOMING

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Wyoming on the grounds that:

(1) The questions raised by the Appellant are so unsubstantial that they do not merit further argument;

(2) The decision of the Wyoming Supreme Court makes it clear that no substantial federal question is raised in this case; and

(3) The decision of the Wyoming Supreme Court rests, in part, on an adequate state basis and therefore it is unnecessary to address the federal issues raised in that argument.

I.
ISSUES INVOLVED AND THE NATURE OF THE CASE.

A. ISSUES.

The Appellant does not challege any Wyoming statutes pertaining to the regulation of insurance on a constitutional basis. Rather Appellant asserts that as applied to it, these statutes offend several principles of constitutional law.

(i) Appellant asserts it is a federal enclave and hence immune from State regulation or taxation.

(ii) Appellant asserts it is a federal instrumentality and therefore is immune from State regulation or taxation.

(iii) Appellant asserts that because it is a "mail order" insurer and has no direct contacts with Wyoming, this State has no jurisdiction. Appellant asserts that the contracts of insurance are entered into beyond the borders of Wyoming and thus are beyond the reach of this State.

(iv) Appellant asserts that because the tax imposed on Appellant is not apportioned, it is in violation of the principles of due process and equal protection.

(v) Finally, Appellant asserts that the Insurance Commissioner's acts with respect to the cancellation of an insurance policy constituted an impairment of contract which offended due process and equal protection principles.

B. PROCEEDINGS BELOW.

On September 15, 1976, a complaint was filed against Appellant alleging that it was conducting the business of insurance in Wyoming without a certificate of authority and had failed to pay a premium tax as required by Wyoming law. As a result of an administrative hearing into that complaint, a $5,000.00 assessment and a 2½% premium tax were levied against Appellant. The decision was appealed to the district court by Appeallant. The district court upheld the action of the Commissioner. Appellant then appealed to the Wyoming Supreme Court which also upheld the Commissioner.

II.

THE ISSUES RAISED IN THE APPELLANT'S JURISDICTIONAL STATEMENT MAKE IT CLEAR THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

A. UNDER THE McCARRAN-FERGUSON ACT AND GENERAL PRICIPLES OF JURISDICTION, THE STATE OF WYOMING HAS THE AUTHORITY TO REGULATE AFCIA.

The McCarran-Ferguson Act, 15 U.S.C. §§1011-1015, reserves to the several states the power to regulate insurance. The Appellant is an insurance company which sells insurance in Wyoming as well as many other states. Since AFCIA is an insurance company, it is next necessary to determine that it is doing business in the State of Wyoming. The activities which Appellant conducts in Wyoming were determined by the Wyoming Supreme Court to be sufficient to constitute the minimum contacts necessary for Wyoming to assert jurisdiction. *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L.Ed.2d 1283 (1958), rehearing denied 358 U.S. 858, 79 S. Ct.

10, 3 L.Ed.2d 92; *International Shoe Company v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed.2d (1945); and see *Olmstead v. American Granby Co.*, 565 P.2d 108 (Wyo. 1977). In cases with comparable factual settings, this Court has decided that the sale of insurance by out-of-state companies constitutes the minimum contact necessary to sustain jurisdiction. *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L.Ed.2d 233 (1957); *Travelers Health Association v. Virginia*, 339 U.S. 643, 70 S. Ct. 927, 94 L.Ed. 1154 (1950).

In conclusion, it is clear that the Appellant is an insurance company. Moreover, the well-delineated jurisprudence of the U.S. Supreme Court would confer jurisdiction on Wyoming over the Appellant, absent some recognized exception, e.g. immunity because it is a federal instrumentality. Applying these well-delineated principles to the case at bar, it is clear that Wyoming had jurisdiction over AFCIA for the purposes of imposing the $5,000.00 assessment and requiring payment of the premium tax.

B. THE REGULATION WHICH THE STATE OF WYOMING HAS IMPOSED ON AFCIA IS CONSISTENT WITH THE GUIDELINES SET DOWN BY THE U.S. SUPREME COURT.

At the outset it can fairly be said that the states have broad discretion in the regulation of the insurance industry. AFCIA does not differ significantly from many other insurance companies who do business on a national scale.

The power of the states to regulate insurance companies has a long history of development in the U.S. Supreme Court. *Hooper v. California*, 155 U.S. 648, 15 S. Ct. 207, 39 L.Ed. 197 (1895); *Allgeyer v. State of Lousiana*, (1897); *St. Louis Cotton Compress Company v. State of Arkansas*, 260 U.S. 346, 43 S. Ct. 125, 67 L.Ed. 297 (1922); *Connecticut General*

Life Insurance Company v. Johnson, 303 U.S. 77, 58 S. Ct. 436, 82 L.Ed. 673 (1938); *Osborn v. Ozlin*, 310 U.S. 53, 60 S. Ct. 758, 84 L.Ed. 1074 (1940); *Hoopseton Canning Co. v. Cullen*, 318 U.S. 313, 63 S. Ct. 602, 87 L.Ed. 777 (1943); *Travelers Health Association v. Virginia*, 339 U.S. 643, 70 S. Ct. 927, 94 L.Ed. 1154 (1950); and *State Board of Insurance v. Todd Shipyards*, 370 U.S. 451, 82 S. Ct. 1380, 8 L.Ed.2d 620 (1962).

After carefully considering the historical background of this issue, the Wyoming Supreme Court concluded that this case was distinguishable factually from those U.S. Supreme Court cases which held against the power of the states to regulate and tax mail order-type operations. See Generally, *People v. United National Life Insurance Company*, 58 Cal. Rptr. 599, 427 P.2d 199 (1967); and *Ministers Life and Casualty Union v. Haase*, 30 Wis.2d 339, 141 N.W.2d 287 (1966), appeal dismissed 385 U.S. 205, 87 S. Ct. 407, 17 L.Ed.2d 301, reh. den. 385 U.S. 1033, 87 S. Ct. 739, 17 L.Ed.2d 681.

When the facts of this case are considered as they are set out in the opinion of the Wyoming Supreme Court (See Jurisdictional Statement, pp. A52-A53) it is clear that no substanitial issue exists as to the jurisdiction of the State of Wyoming to regulate and tax AFCIA. Moreover, it is clear that the regulation and taxation is within the guidelines already established by this Court.

For these reasons the constitutional provisions cited by Appellant are inapplicable when considered in light of the facts of this case.

C. AFCIA IS NOT A FEDERAL ENCLAVE OR A FEDERAL INSTRUMENTALITY AND HENCE IS NOT EXCEPTED FROM REGULATION OR TAXATION FOR THAT REASON.

A federal instrumentality must be created by federal

statutes or federal regulations. *McCulloch v. Maryland*, 17 U.S. (4 Wheat. 316) 429, 4 L.Ed. 579 (1819); *Johnson v. Maryland*, 254 U.S. 51, 41 S. Ct. 16, 65 L.Ed. 126 (1920); *Department of Employment v. United States*, 385 U.S. 355, 87 S. Ct. 464, L.Ed.2d 414 (1966); *Standard Oil Company of California v. Johnson*, 316 U.S. 481, 62 S. Ct. 1168, 86 L.Ed. 1611 (1942).

AFCIA has no statutory authorization. There is no federal regulation which gives official existence to AFCIA. There are no facts which indicate that AFCIA provides an indispensable function for the federal government. There are no facts which indicate that AFCIA receives substantial assistance from the federal government in any officially authorized manner. Appellant presented no facts that indicated it was itself a federal enclave. Rather, Appellant has its headquarters on a federal enclave. The Wyoming Supreme Court rejected any theory that Appellant could be a federal enclave. The Wyoming Supreme Court carefully reviewed the facts presented by AFCIA in the light of pertinent U.S. Supreme Court case law and found that AFCIA has no claim to immunity based on being a federal instrumentality. (See Jurisdictional Statement pp. A-32-37).

Appellant's assertions that the State of Wyoming is tinkering with and interfering with the Department of Defense establishment is wholly without substance. The State of Wyoming seeks only to ensure that residents of Wyoming, whether military or civilian, are receiving insurance protection that is consistent with the legislative standards which protect insurance consumers.

For these reasons, the constitutional provisions cited by Appellant are not offended by the activities of the Wyoming Insurance Commissioner.

D. THE TAX IMPOSED IS FAIRLY APPORTIONED UNDER CONSTITUTIONAL STANDARDS.

Appellant asserts that Wyoming has not apportioned the premium tax between AFCIA's Wyoming activities and its activities elsewhere. The authority cited by Appellant is not in point. Only those premiums which are collected on Wyoming risks are taxed by Wyoming, and hence the tax imposed is already apportioned. The Wyoming Supreme Court, in considering relevant U.S. Supreme Court decisions, determined that the tax imposed was constitutionally fair. The tax imposed is clearly within the controlling standard, i.e., has the State given anything for which it can ask a return. *General Motors Corp. v. Washington*, 377 U.S. 436, 440-441, 84 S. Ct. 1564, 12 L.Ed.2d 430 (1953); 15 U.S.C.A. 1012, footnote 15. As pointed out by the Supreme Court of Wyoming, it will be, in part, the efforts of this State in reducing those risks that casualty insurance protects against, which will determine the ultimate cost of AFCIA doing business here. It will be the State of Wyoming which must expend its efforts to provide the proper business climate for conducting the business of insurance. (See Jurisdictional Statement, p. A57).

The tax has been fairly apportioned and the constitutional provisons cited by Appellant are inapplicable to the factual situation of this case.

E. APPELLANT MAKES NO LEGALLY OR PHILOSOPHICALLY COGNIZABLE ARGUMENT WITH RESPECT TO IMPAIRMENT OF CONTRACT.

This argument was not given any consideration by the Wyoming Supreme Court for the reason that the issue was not properly briefed. This problem persists. Appellant has neither delineated the theory which supports the question he raises, nor has he brought forward any authority to support it.

However, it is clear from the record that a request to cancel the policy of Lt. Col. Aparicio was made and the request was complied with. No facts have been brought forward which contradict this view. There is absolutely no basis in fact or in law which indicates that this question is so substantial as to require plenary consideration by this Court.

III.

NO SUBSTANTIAL FEDERAL QUESTION IS RAISED

In order to invoke the jurisdiction of the U.S. Supreme Court there must be a substantial federal question presented:

> Whether there is such a question in the case is a matter that the Supreme Court must decide for itself. The mere presence of a federal question will not permit review, however, unless that federal question is "substantial." Even though a question as to federal law has been raised, if it appears that the question is wholly formal, or is so absolutely devoid of merit as to be frivolous, or has been explicitly foreclosed by a decision of the Supreme Court so as to leave no room for real controversy, the court will not hear the case.
>
> Wright, *Law of Federal Courts*, Ch. 12, §107, pp. 485-486 (1970).

It is also required that the federal question be raised in a proper manner in the State courts. *Id.*, at p. 486.

As to each of the issues raised by AFCIA, the Appellee contends:

(A) The states are so clearly vested with authority to regulate insurance that any question with respect to the powers of a state to regulate an insurance company, AFCIA included, is explicitly foreclosed by prior U.S. Supreme Court decisions. There is no real controversy. (See argument II-A, *supra.*)

(B) The regulation and taxation undertaken by the State of Wyoming with respect to AFCIA is clearly within the guidelines set down by prior U.S. Supreme Court decisions. Here again, a decision contrary to that of the Wyoming Supreme Court is explicitly foreclosed by prior U.S. Supreme Court decision (See Argument II-B, *supra*).

(C) AFCIA is clearly not a federal enclave or a federal instrumentality. No other conclusion can be reached in that regard. This question is devoid of merit and is frivolous and is explicitly foreclosed by prior U.S. Supreme Court decisions (See Argument II-C, *supra*).

(D) The Wyoming tax is apportioned and is clearly within the realm of constitutional fairness and there is no substantial question in view of prior U.S. Supreme Court decisions (See Argument II-D, *supra*).

(E) As to the impairment of contract issue, the record is clear that the question is devoid of merit and is frivolous. This question, moreover, was not properly raised in the state court in that Appellant failed to support his claim by proper briefing and argument (See Argument II-E, *supra*).

IV.

THERE IS AN ADEQUATE STATE BASIS FOR ONE OF THE QUESTIONS AT ISSUE HERE

The most important limitation on U.S. Supreme Court review is that the Court will not review judgments of state courts that rest on adequate and independent state grounds. Wright, *Law of Federal Courts*, *supra*, Ch. 12, §107, pp. 487-488. Even where the issue is decided on precedural grounds, which results in no consideration being given the merits of the federal question, the Court will decline review if the procedural rule serves a legitimate state interest. *Id*, p. 490.

As to the issue of impairment of contractual rights, treated as question "E" in the preceding two arguments, there is an adequate state ground for disposition in that there is a legitimate state interest in preserving proper and orderly appellate procedure. The failure of a party to support an assertion of error with pertinent authority and cogent argument is treated as fatal to consideration of the question by virtually all appellate courts. The interest at stake is, of course, the delineation of a case or controversy. Moreover, without such authority and argument, the burden would be placed on the appellate court to do the research and determine the perimeters of the question presented. This would place an onus on the appellate court and leave the adverse party in limbo as to the exact nature of the question presented.

There exists an adequate state ground for decision of this issue. Even in the presence of a federal question, which Appellate has failed to delineate, this assertion of error should be dismissed.

V.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as to not need further argument. Moreover, no substantial federal question is presented in any of the issues raised. Finally, as to the issue of impairment of contract, there exists an adequate state basis irrespective of any federal questions.

Appellee respectfully moves the court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Wyoming.

Respectfully submitted,

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